STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ARCHITECTURAL PRODUCT SOLUTIONS, INC., a Michigan corporation,

Plaintiff,

vs. Case No. 2006-0700-CZ

AMERICAN SPECIALTIES, INC., a foreign corporation, GILBERT J. PESAVENTO, JR., an individual, KATHRYN KOCIS, an individual, and SIGNATURE SPECIALTIES, INC., a Michigan corporation,

Defendants.
_____/

OPINION AND ORDER

Defendants American Specialties, Inc. (ASI) and Pesavento have filed a motion for summary disposition.

Plaintiff Architectural Product Solutions, Inc. (APS) filed this complaint on February 14, 2006. Plaintiff alleges that it entered into agreements with defendants ASI and Pesavento to act as "architectural representative" for three product lines manufactured by ASI. Plaintiff claims that these agreements were conditioned on its hiring of defendant Kocis at an exorbitant salary. Plaintiff asserts that ASI unilaterally substituted a new product line for one of the agreed lines at the outset of the parties' relationship. Plaintiff further asserts that it terminated its relationship with one of its longstanding suppliers pursuant to ASI's request. Nevertheless, plaintiff claims that ASI failed to timely pay commissions due to APS. Plaintiff alleges that Kocis quit after approximately one year, upon which ASI terminated its relationship with APS and Kocis took over the architectural representation of product lines formerly assigned to APS.

Plaintiff now brings Count I, for misrepresentation and fraud in the inducement, Count II, for declaratory judgment, Count III, for failure to pay commissions due, Count IV, for conspiracy to misappropriate trade secrets and for misappropriation, Count V, for breach of contract, Count VI, for promissory estoppel, Count VII, for tortious interference with business relations, Count VIII, for breach of fiduciary duties and misappropriation, and Count IX, for conspiracy to commit fraud.

Defendants ASI and Pesavento bring their motion for summary disposition under MCR 2.116(C)(4), alleging that this Court lacks subject-matter jurisdiction over the parties' dispute. However, the Court believes that, despite having brought their motion under MCR 2.116(C)(4), defendants ASI and Pesavento's motion is actually a motion to dismiss on the basis of *forum non conveniens*, while their requests to prevent plaintiff from introducing evidence of alleged collateral parol agreements and to preclude plaintiff's tort claims are actually motions for partial summary disposition under MCR 2.116(C)(8) or (C)(10).

In deciding whether to dismiss a case based on *forum non conveniens*, a court must consider whether the forum is inconvenient and whether a more appropriate forum exists. *Robey v Ford Motor Co*, 155 Mich App 643, 645; 400 NW2d 610 (1986). In making this determination, the court must consider the private interests of the litigants, matters of public interest, and a party's promptness in raising the doctrine of *forum non conveniens*. See *Cray v General Motors Corp*, 389 Mich 382, 395-396; 207 NW2d 393 (1973). If there is no more appropriate forum, the court must exercise its jurisdiction, and even if another more appropriate forum exists, the court must still exercise jurisdiction unless its own forum is "seriously inconvenient." *Robey, supra*. In short, a "plaintiff's selection of a forum is ordinarily accorded deference" and should not be disturbed unless the balance of the factors is strongly in the

defendant's favor. *Anderson v Great Lakes Dredge & Dock Co*, 411 Mich 619, 628; 309 NW2d 539 (1981).

A request for summary disposition under MCR 2.116(C)(8) may be granted if the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim. *Outdoor Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). The Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of material fact exists to warrant a trial, resolving all reasonable inferences in the nonmoving party's favor. *Id.*

In support of their motion for summary disposition, defendants ASI and Pesavento argue that this Court lacks subject-matter jurisdiction over this case due to the governing law provisions contained in the architectural representative agreements entered into by the parties. They claim that the parties voluntarily selected the jurisdiction and laws of New York State. They note the actions and performance of the parties took place in three different states. They urge that plaintiff should not be allowed to rely upon the architectural agreements to establish its right to commissions while ignoring the agreements' governing law provisions. Next, they assert that the architectural agreement is the only basis for any relationship between the parties. They claim that plaintiff will not be deprived of justice by resorting to the laws of the state of New

York. Finally, they argue that plaintiff's tort claims must be dismissed, claiming that they are based exclusively on the parties' contractual duties.

Plaintiff responds that this Court clearly has subject-matter jurisdiction over this case. Plaintiff also claims that the forum selection clauses contained in the parties' agreements are unenforceable. Plaintiff next argues that the purported forum selection clause does not require that all suits be brought exclusively in New York. Plaintiff urges that it is not precluded from seeking payment of the commissions which it is allegedly owed, despite the termination of the contract. Plaintiff claims that defendants ASI and Pesavento's motion for summary disposition was brought under the wrong court rule and should therefore be dismissed. Plaintiff next claims that the integration clauses in the architectural representative agreements do not preclude it from introducing parol evidence of the parties' collateral agreements. Finally, plaintiff claims that its tort claims are independent of its contract claims and are based on misfeasance rather than nonfeasance.

First, the Court shall address ASI and Pesavento's contention that this Court lacks subject-matter jurisdiction over this case since the parties agreed to submit to the jurisdiction and law of the State of New York. MCL 600.605 provides that "[c]ircuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given . . . to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." Parties do not have a private right to stipulate subject-matter jurisdiction. *Redding v Redding*, 214 Mich App 639, 643; 543 NW2d 75 (1995). As such, this Court clearly has subject-matter jurisdiction over this case.

Having determined that the parties' governing law provisions would not abrogate this Court's subject-matter jurisdiction, the Court recognizes that ASI and Pesavento's motion for

summary disposition has been brought under the wrong court rule. However, failure to cite the appropriate court rule in a motion for summary disposition, does not preclude the court from reviewing a motion under the correct court rule. See, e.g., *De Caminada v Coopers & Lybrand*, 232 Mich App 492, 495, n 1; 591 NW2d 364 (1998). Therefore, the Court shall address this motion for summary disposition under the doctrine of *forum non conveniens*, MCR 2.116(C)(8) and MCR 2.116(C)(10).

First, the Court shall determine whether declining to exercise this jurisdiction is appropriate on the basis of *forum non conveniens*.[1] The Court has carefully reviewed the documentary evidence presented, and notes that the architectural representative agreements in this matter specifically provide that, upon termination of the agreement, "all rights and obligations hereunder shall automatically cease, with the exception of the rights and obligations hereinafter contained in paragraph 10 and 12." The governing law provisions relied on by defendants ASI and Pesavento are contained in paragraph 13 of their agreements. Defendants ASI and Pesavento do not dispute that the parties' contracts have terminated. As such, the parties' agreements suggest that the governing law provisions are no longer in effect.

Absent the governing law provisions, the Court can discern no substantial private or public interests favoring New York as a more convenient forum for this case. Since plaintiff's choice of forum should be afforded deference unless the forum is seriously inconvenient, *Anderson*, *supra*, the Court will not decline to exercise its jurisdiction over this matter.

Next, the Court disagrees with ASI and Pesavento's contention that plaintiff should not be permitted to maintain an action for commissions owed if the Court determines that governing

[1] Defendants ASI and Pesavento do not explicitly raise the issue of forum non conveniens, but the Court believes that their argument ostensibly concerning "subject-matter jurisdiction" is more appropriately characterized as an argument concerning *forum non conveniens*.

law provision is no longer in effect. ASI and Pesavento have cited no authority in support of this position. A party may not merely announce his position and leave it to the court to discover and rationalize the basis for his claims, *Wilson v Taylor,* 457 Mich 232, 243; 577 NW2d 100 (1998), nor may he give issues cursory treatment with little or no citation of supporting authority. *Houghton v Keller,* 256 Mich App 336, 339; 662 NW2d 854 (2003).

ASI allegedly owes APS money for commissions earned *prior* to the termination of the parties' contractual relationship. Accepting APS's allegations as true for purposes of ASI and Pesavento's motion, ASI breached the parties' underlying agreements. Given ASI and Pesavento's failure to cite any law to the contrary, the Court is satisfied that APS cannot be bound by the terms of agreements that ASI allegedly breached. Further, even if, *arguendo*, the governing law provisions in the parties' agreements were enforceable, the provisions would merely mandate that plaintiff submit to New York's jurisdiction. They would not preclude plaintiff from commencing suit in another jurisdiction. Therefore, plaintiff may maintain an action for commissions owed despite its contention that the parties' contractual relationship has terminated.

The Court now turns to the admissibility of parol evidence pertaining to defendant Kocis' employment with APS. Once again accepting APS's factual allegations as true for purposes of this motion, APS's hiring of Kocis was a condition precedent to ASI entering in to its architectural representation agreement with APS. Parties may enter into collateral parol agreements concerning some matter on which their written agreement is silent, and proof of such collateral agreements may be proffered as long as no attempt is made to vary or contradict the written agreement. See, e.g., *Stimac v Wissman*, 342 Mich 20, 25; 69 NW2d 151 (1955). However collateral parol agreements must not be introduced where the contract is completely

integrated and contains a merger clause. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 501; 579 NW2d 411 (1998). While parol evidence is "generally admissible to prove fraud, fraud that relates solely to an oral agreement that was nullified by a valid merger clause would have no effect on the validity of the contract. Thus, when a contract contains a valid merger clause, the only fraud that could vitiate the contract is fraud that would invalidate the merger clause itself." *Hamade v Sunoco Inc (R&M)*, ___ Mich App ___, ___ NW2d ___ (Docket No 265226, Dec'd May 25, 2006).

In the case at bar, there is no indication that plaintiff's agents were either unaware of the terms of the agreements they signed, or were unaware that these agreements contained a merger clause. Therefore, based on the binding authority discussed above, no evidence pertaining to collateral parol evidence may be introduced in order to explain the terms of the parties' agreement for purposes of supporting plaintiff's contract claims.

Lastly, the Court turns to ASI and Pesavento's contention that plaintiff's tort claims are based solely on their alleged nonfeasance of their contractual duties, and thus cannot survive a dismissal of plaintiff's contract claims for lack of subject-matter jurisdiction. It is well established that "a tort action will not lie when based solely on the nonperformance of a contractual duty." *Fultz v Union-Commerce Associates*, 470 Mich 460, 466; 683 NW2d 587 (2004) (citations omitted). The threshold inquiry is whether a defendant owes a duty to the plaintiff which is separate and distinct from defendant's contractual obligations. *Id.* at 467-468.

These distinctions, however, have no bearing on the Court's subject-matter jurisdiction over plaintiff's tort claims. Since the Court has subject-matter jurisdiction over plaintiff's contract claims, and since there is no reason for the Court to decline to exercise jurisdiction over

these claims on the basis of *forum non conveniens*, the basis for plaintiff's tort claims (i.e., nonfeasance or misfeasance) is inapposite.

For the reasons set forth above, defendants ASI and Pesavento's motion for summary disposition is DENIED. However, plaintiff is ORDERED to refrain from introducing any parol evidence explaining the terms of the parties' integrated written agreements. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: JUL 25 2008

DMD/aac

cc: Mark E. Hauck, Attorney at Law
Thomas G. McHugh, Attorney at LAw

DIANE M. DRUZINSKI
CIRCUIT JUDGE
JUL 25 2008
A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: Court Clerk